87-1419

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN PETER CERONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the drafter of a federal indictment required to make a reasonable effort to express the theory of guilt upon which the prosecution plans to rely?

2. Is every conspirator, without more and by definition, both a principal in and an aider and abettor of every action taken in furtherance of the conspiracy?

3. Is "an agreement or understanding to commit the crime of conspiracy" an offense? If so, is it legally possible to be an aider and abettor of such an offense?

4. Where a Defendant is charged with conspiracy and, as an aider-abettor, with the commission of a series of related substantive offenses which also are pleaded as conspiratorial overt acts,

Is there any limitation on the power of the court to impose consecutive sentences for each of those acts?

5. Where a defendant is charged with unlawful interstate travel from Chicago to Kansas City, can the jurisdictional element of guilt be proved by showing that the defendant normally lived in Chicago and was seen in Kansas City, without any showing where the defendant had been for one month immediately preceding his perceived presence in Kansas City?

In order to avoid duplication of presentations, Petitioner adopts in support of this Petition, to the extent applicable to him, the matters presented to this Court within the Petitions filed by his co-defendants, sub nomine Joseph John Aiuppa v. United States; Angelo LaPietra v. United States; Joseph Lombardo v. United States; and Milton Rockman v. United States.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Plaintiff-Appellee:
United States of America

Defendants-Appellants:
John Peter Cerone, this Petitioner
Milton John Rockman
Joseph John Aiuppa
Angelo LaPietra
Joseph Lombardo

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The petitioner John Peter Cerone respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceeding on October 8, 1987.

REPORT OF OPINION DELIVERED IN THE COURT OF APPEALS

The opinion of the Court of Appeals for the Eighth Circuit is reported as *United States v. Cerone* at 830 F. 2d 938. (A-1)

No opinion was rendered by the trial court in entering the judgment reviewed by the Court of Appeals.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion of the Court of Appeals was delivered on October 8, 1987.

A timely petition for rehearing and for rehearing en banc was filed, and an order denying that relief was entered on December 23, 1987.

No order granting an extension of time within which to petition for certiorari has been requested or granted.

Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by the terms of Title 28, United States Code, Section 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution of the United States provides in relevant part as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defence.

Title 18, United States Code, Section 2, is as follows:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18, United States Code, Section 371, is as follows:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 1952, is as follows:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section, "unlawful activity" means . . . any business enterprise involving gambling . . . in violation of the laws. . . .

STATEMENT OF THE CASE

After a jury trial, Petitioner and four co-defendants were convicted of one count of conspiracy and seven counts of violation of the Travel Act, Title 18, U.S. Code, Section 1952.

Resolving all fact questions in favor of the government, the evidence showed a conspiracy to obtain loans from the Teamsters Pension Fund; to use those loans to enable third persons to purchase certain Nevada gambling casinos; to "skim" a portion of the money earned by those casinos; and to distribute that money among conspirator residents of several states. (Although reference to further detail is unnecessary for purpose of considering the issues raised by this Petition, the facts are more fully stated within the appended Court of Appeals opinion, at pages A-2 through A-6.)

Count 1 charged the foregoing conspiracy as a violation of Title 18, U.S. Code, Section 371. Counts 2 through 8 charged substantive violations of the Travel Act. Each of those counts alleged that one conspirator had performed interstate travel or communication with unlawful intent,

"and thereafter did perform and attempt to perform acts to promote . . . said unlawful activity." There was no description of the nature of the "acts to promote", nor of the time and place of their performance. Bills of particulars were denied.

The travel or communication alleged within each of the substantive counts also were pleaded within Count 1 as overt acts in furtherance of the conspiracy. Within each substantive count, all defendants other than the named actor were indicted as aiders and abettors of the offense. There was no evidence of direct aiding or abetting activity, but the prosecutor relied upon *Pinkerton v. United States*, 328 U.S. 640 (1946), as authority for his position that all conspirators were aiders and abettors of all overt acts performed in furtherance of the conspiracy.

Petitioner Cerone was convicted of all offenses charged against him: As a conspirator in Count 1, as an unlawful traveler from Chicago to Kansas City in Count 7, and as an aider-abettor of interstate activity performed by confederates in each of the other six counts. Then age 71, he received consecutive sentences of four years on the conspiracy count and 42 months on each of the substantive counts, for a total of 28½ years, and was ordered to pay fines and forfeitures in excess of $140,000.00.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This Petition invites the Court's resolution of two areas of conflict among federal circuits: Whether a conspirator is an aider-abettor *per se*, and whether one can be convicted of aiding a Travel Act violation of which he had no direct personal knowledge.

It also invites the Court's consideration of other serious problems affecting the administration of federal criminal justice.

The Inscrutable Accusation

In recent years, federal criminal indictments have taken on a character inconsistent with their constitutional role. Running on for page after turgid page of prosecutorial Mandarin, in multiple counts which vary little if at all from one ritualized philippic to the next, they erect a barrier which defies all meaningful attempts to prepare a defense. It is as though they were were designed only as psychological overtures whose purpose is to intimidate indictees and mesmerize jurors through the ponderous, repetitive, but uninformative language in which the stern official malediction is delivered.

The accusation against Petitioner is emblematic of that jural syndrome. He has been sentenced to decades of imprisonment as punishment for vicariously-attributed "acts"—and the key accusation was expressed in exactly that unadorned and unelucidated word.

As in many current prosecutions, the indictment in this case served as a Procrustean bed into whose shackles the government forced the artificially elasticized arms and clumsily amputated legs of its tortured allegations. The indictment apparently was grounded in a sense of confidence that at trial it would be necessary only to show that some wrong had been perpetrated, even if it were not the same wrong described in the indictment and denied by the defense.

The Fifth Amendment assures that accused citizens can be punished only for those offenses charged by a grand jury, and that such persons will have a reasonable op-

portunity to prepare for their trials. The Sixth Amendment, by its express terms, requires that Petitioner be informed of the nature and cause of the accusation. Those, however, are mere theories underlying our governmental structure; with increasing frequency, they are dishonored in practice, victims of impatience with Constitutional concepts which are regarded by their appointed guardians as minor inconveniences. We therefore are unable even now, after conviction and appellate affirmance, to delineate the precise offenses with which Petitioner was charged.

As best we understand it, however, he was convicted of:

(1) Agreeing to conspire; and

(2) Conspiring to aid and abet the conspiracy of which he was a member; and

(3) Aiding and abetting, simply by being a conspirator, other acts which were never specified, either as to their nature or as to the time or place of their commission; and

(4) Traveling from Chicago to Kansas City by traveling from Kansas City to Chicago, a feat which was deemed possible because a month earlier he had been in Chicago.

That defiance of the Fifth and Sixth Amendments proceeded from an indulgent judicial interpretation of an indictment which need not have been cast differently if its purpose had been to confuse rather than to inform. The least of its insults to reality was its allegation that Petitioner had travelled from Chicago to Kansas City, an accusation which was based principally on reports from government agents who had seen Petitioner take a plane from Kansas City to Chicago (A-21)! The impact of such dissemblance upon the trial strategy of a criminal defendant is obvious; the only appropriate description is trial

by ambush. The tactic should be deemed intolerable by a fair-minded society even if no Constitution ever had been adopted.

It is not only a reader of the record who must express uncertainty concerning the nature of Petitioner's offense. There also is no reason to believe that the jurors who convicted him had a clearly defined basis for their verdict. They were asked to determine whether the evidence established "an agreement or understanding to commit the crime of conspiracy", and were told that the elements of "that crime" were unlawful use of interstate commerce and subsequent performance of an act in furtherance of illegality, all of which in turn could be attributed to Petitioner although done by others (App. 188, R. 3732). They also were told that if Petitioner had so conspired, he was responsible for the acts of co-conspirators on an agency theory (App. 191, R. 3741).

In short: The jury was authorized to convict Petitioner of a conspiracy to conspire, basing its verdict on Petitioner's vicarious liability of the formation by co-conspirators of both the primary and secondary conspiracies!

As to the substantive counts, numbers 2 through 8, the jury were told that, given the conspiratorial elements, the crime was complete if they found that "acts of furthering" also had been performed (App. 190, R. 3740.)

The charge did not identify the required acts of furthering. We cannot term them "alleged acts", because there was no such allegation. The jury could not even look to the indictment for a hint concerning the nature of the "acts of furtherance" with which Petitioner was charged. The indictment identified no such acts.

The Court of Appeals excused that omission on the ground that Petitioner was not "entitled to know the evidentiary details with which the government intends to

convict him" (A-23). Petitioner clearly was entitled, however, to some narrowing of the infinite number of possible but unspecified "acts in furtherance" charged against him in each count. A complete analogy would be to charge a defendant with theft "in statutory language" (A-23), with no indication of what was stolen, or when, or where, or from whom.

The Court of Appeals also treats that problem as harmless because "the indictments contained lengthy statements of fact" (A-23). Lengthy statements, indeed; but it is only Count 1, the Conspiracy Count, which contains significant statements of *fact.* Those alleged facts may or may not have been the "acts in furtherance" upon which the other counts were hinged; there is no way of knowing. The substantive counts contain no hint as to the nature of those "acts".

Count 1 most certainly does not suffer from taciturnity. Its verbosity does not, however, mitigate the unintelligibility of the substantive counts. Each of those counts charged a separate crime, but expressed only a prolix and confusing allegation that one defendant, after traveling or telephoning interstate, had performed undescribed "acts in furtherance", saying nothing about the nature, date or place of such acts.

In anticipation of the standard claim of harmlessness, we point out that under the indictment as laid, and under the charge as given to the jury:

> If six jurors believed that Act "A" was performed, but did not believe that Act "B" was performed,
>
> And if six other jurors believed that Act "B" was performed, but did not believe that Act "A" was performed,
>
> Then the Petitioner could be convicted, in effect, of vicarious performance of both Acts "A" and "B".

Petitioner was thus subjected to a procedure which authorized conviction if each of the twelve jurors believed him guilty of a different crime, even if each of them rejected the specific findings of the other eleven.

That can be deemed harmless only if one regards the Sixth Amendment as a technicality.

The Anomalous Involvement

Within six substantive Counts, Petitioner was indicted as an aider and abettor of unlawful interstate travel or communication, in violation of Title 18 U.S.C. Sec. 1952.

There was no evidence to support the allegation that Petitioner aided or abetted any of those acts. The Court of Appeals does not quarrel with this assertion (A-8); indeed, the prosecutor did not claim that the evidence showed any aiding or abetting as those words conventionally are defined. Instead, it was his trial theory that because Petitioner and his co-defendants were conspirators, they also *per se* were aiders and abettors. His contention was based entirely and expressly on *Pinkerton v. United States*, 328 U.S. 640 (1946). (Tr., Vol. 55, p. 10)

Pinkerton, however, expressly disclaimed the theory on which the prosecutor relies.

That case has been cited by many courts, including the court below (A-8), for proposition that a party to a continuing conspiracy is liable vicariously for every furthering substantive offense committed by any of his co-conspirators, even though he may have no knowledge of that offense.

We do not challenge the basic holding of *Pinkerton*. No such challenge is required in this case, and none would be appropriate.

We do, however, urge a critical inquiry into the manner in which *Pinkerton* is applied, daily, in this and in innumerable other cases, as a vehicle for the artificially abusive multiplication of offenses and sentences. Absent this Court's interdictive process, misuse of the *Pinkerton* doctrine almost certainly will continue to expand at an increasing rate, spurred by the currency of hundred-plus count indictments and the readily predictable impact of the new sentencing guidelines promulgated pursuant to Pub. L. 100-182.

In this case, as in many others, *Pinkerton* has been carried beyond its logical limit.

Misuse Of Aider-Abettor Doctrine

Pinkerton did not hold that a conspirator is by definition an aider-abettor. Indeed, it held exactly the opposite. The *Pinkerton* Court took pains to point out that aider-abettor doctrine falls completely beyond the reach of that decision:

> "Daniel [the vicarious actor] was not indicted as an aider or abettor [statutory reference], nor was his case submitted to the jury on that theory." (328 U.S. at 646, fn. 6)

There is absolutely no feature of the *Pinkerton* decision which lends itself to the interpretation that a conspirator is *per se* an aider-abettor. Such a definition would comport neither with lexicography nor with logic. This Court's subsequent opinion in *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1948), makes it clear that the aider-abettor theory is an *alternative* to the *Pinkerton* concept of vicarious attribution, rather than a method of applying *Pinkerton*, as viewed by the court below. The Eighth Circuit rule not only proceeds in disregard of *Nye*

& Nissen, but also conflicts with the holding of the Fifth Circuit in *United States v. Bright*, 630 F.2d 804, 813 (1980), and that of a Seventh Circuit District Court in *United States v. Miller*, 552 F. Supp. 827, 830 (N.D. Ill. 1982).

It obviously is possible to be an aider-abettor without also being a conspirator. One who volunteers assistance or encouragement during the commission of a crime, without any antecedent agreement for the furnishing or acceptance of that aid, would be an aider-abettor but would not be a conspirator. Nor would the principal criminal also become guilty of conspiracy simply by failing to interrupt his criminal activity for the purpose of expressly disavowing the volunteered encouragement.

Similarly, as *Pinkerton* itself makes clear, it is readily possible to be a conspirator without also being an aider-abettor of the substantive crime which is the conspiratorial objective. Daniel Pinkerton is the paradigm: the person who agrees to the commission of a joint crime, but does not tender any overt assistance. *Pinkerton* treats such a person as a vicarious principal offender, an artificial status derived from agency principles. That scenario, however, involves no aiding or abetting, activities which obviously imply direct personal participation on the part of the aider-abettor.[1]

That view finds support in the Sixth Circuit rule as delineated in *United States v. Alsobrook*, 620 F.2d 138, 144 (1980). *Alsobrook* holds that one cannot be convicted of aiding and abetting a Travel Act violation unless it is

[1] The question whether one may become a vicarious aider-abettor, while philosophically intriguing, has no conceivable relevance to the case at bar.

shown that he had actual knowledge of the violation. The Sixth Circuit accordingly rejects the rule of the Eighth Circuit, as reflected by the opinion here offered for review, that all persons involved in an enterprise may be convicted of a Travel Act violation if any one of them travels in interstate commerce. As shown by *Alsobrook*, 620 F.2d at 144, the Sixth Circuit rule conflicts with that of other Circuits as well. We urge that this conflict be resolved in favor of the Sixth Circuit view, because it is by far the more logical approach in light of the basic nature of aider-abettor involvement.

* * *

It is, of course, *possible* that an accomplice may be both a co-conspirator and an aider-abettor. No law of physics prevents a person who has joined a conspiracy, from thereafter lending direct and active assistance or encouragement during the actual commission of the substantive crime. Such a person, however, would be a conspirator because he had personally conspired, and an aider-abettor because he had personally assisted the crime. No part of his criminal liability would be derived vicariously from the *Pinkerton* principle.

To those who may inquire whether it makes any practical difference whether Petitioner is convicted as a principal or as an aider-abettor, the penalties being the same in either case, we offer a simple answer: To treat those terms as interchangeable is offensive both to logic and to the Constitution itself.

The illogic of the attribution of aider-abettor status in cases such as this one, is obvious: Petitioner effectively has been convicted of aiding and abetting a crime because he conspired to commit it and therefore is a principal offender. Simply stated, he has been convicted of aiding and

abetting himself. The Court of Appeals acknowledges that our argument may be logical, but rejects it because it is not believed to be supported by case law (A-8). We urge that case law should be logical. From the earliest origins of the common law, judges have taken pride in that concurrence, and have taken pains to justify that pride. To the extent that case law does not comport with logic, it is far better to change the case law than to tinker with logic.

The required change, however, is far less radical than the opinion below would suggest. The Ninth Circuit, unlike the court below, treats the aider abettor concept as one entirely discrete from the *Pinkerton* theory. *United States v. Bantimana*, 623 F. 2d 1366, 1369-70, fn. 2 (1980). We urge that the Ninth Circuit approach be adopted here, for the same reason that we ask your honors to resolve the *Alsobrook* conflict in favor of the Sixth Circuit rule: Logic dictates that result.

From a Constitutional perspective, to charge a defendant as an aider-abettor and convict him on the theory that he is a *Pinkerton*-defined principal, is to violate the Constitutional mandate that an indictee must be informed of the nature of the accusation, and that a conviction can be had only on the charge preferred by the grand jury.

And from an intensely practical perspective, this is another illustration of trial by ambush. The prosecution at all times intended to attribute criminality to Petitioner under the *Pinkerton* doctrine. A simple and straightforward reading of *Pinkerton* would have caused any reasonable prosecutor to charge his targets simply as principals. The same reading would have caused any reasonable defense lawyer to adopt a trial strategy based on the absence of any aiding or abetting act in respect to

the substantive counts. That situation lends itself admirably to the thaumaturgical flourish with which the prosecutor pulled *Pinkerton* from his hat at the Rule 29 stage, all defense bridges having been crossed and burned. The result is a significant impairment of the right to counsel, and a substantial denial of due process.

If that was not the prosecution's battle plan, we will apologize for the suggestion—upon being advised of a legitimate reason why the prosecution, intending to rely on *Pinkerton*, chose to indict Petitioner and the others as aiders-abettors rather than as principals.

Misuse of Conspiracy Doctrine

The prosecution's improbable preoccupation with the aider-abettor liability, infected its conspiracy accusation as well as its substantive counts.

At the prosecution's request, the Court instructed the jury concerning the elements of "an agreement or understanding to commit the crime of conspiracy"—otherwise stated, a conspiracy to conspire. The court delineated certain elements of that supposed offense, and further instructed that the jury need only find that a defendant "did cause, aid, abet, counsel, command, induce and procure the commission of these essential elements of the offenses as charged." (App. 188, R. 3732)

As a philosophical proposition, it is possible to help prospective conspirators to form their conspiracies, perhaps by referring them to other likely co-adventurers. The person rendering such assistance would himself be a conspirator, although he might reasonably be said to have aided and abetted a conspiracy. *People v. Strauch*, 88 N.E. 155 (Ill. 1909). There is, however, no suggestion of any such activity in the case at bar.

It also is possible to aid and abet conspirators in their illegal activities, without having joined the conspiracy. *United States v. Galiffa*, 734 F. 2d 306, 311 (7 Cir. 1984). The charge given to the jury in this case, however, did not encompass that theoretical possibility, which finds no reflection in the evidence in this case.

It is *not* legally possible, however, to aid and abet the formation of a conspiracy among those with whom the aider-abettor himself conspires, thus helping them to agree with their supposed aider-abettor. That concept is less circular than spherical: One can change direction without changing destination.

The jury was authorized to convict Petitioner and the others of a non-offense, and it did so.

The Wrong-Way Travel Offense

The misapplication of aider-abettor doctrine does not affect Petitioner's conviction under Count 7 of the indictment. In that count, he was alleged personally to have violated Section 1952 by travelling from Chicago to Kansas City on January 11, 1979 (App. 37).

On that date, federal agents observed Petitioner traveling from Kansas City to Chicago (A-21). The government avoided making a forthright accusation by alleging that Petitioner traveled from Chicago to Kansas City on that date. (App. 37)

The Court of Appeals considered that accusation proved by the fact that Petitioner lived in Chicago (A-21). There is, however, no evidence that he had been in Chicago at any time within a month prior to his being observed in Kansas City, and no more reason to believe that he came to Kansas City from Chicago than from Joplin, from St.

Louis, or from any other starting point in or out of Missouri. The Court of Appeals further rests its affirmance on the fact that earlier on that day, the agents had seen two unidentified men driven from the Kansas City airport in the same car in which Petitioner was later driven to that airport. From those facts, the lower court holds, it can be inferred that Petitioner came from Chicago to Kansas City on that date (A-21).

The inference is totally untenable. The agents were able to identify Petitioner, but not the two men earlier driven from the airport. More, the government introduced no evidence showing the itinerary of the airplane in which the two unidentified men came to Kansas City, nor even that any airplane had arrived in Kansas City from Chicago at about that time. The evidence certainly does not exclude Petitioner's continuous presence in Kansas City or elsewhere, on unrelated business, for weeks prior to the January 11 observations. There was, for example, no evidence concerning the amount of baggage carried by Petitioner to the Kansas City airport, as probative of the length of his stay there and the likelihood that he had arrived that morning.

There simply is no reason to believe or infer that Petitioner ever traveled from Chicago to Kansas City, except in the sense that every person who was once in Chicago and thereafter in Kansas City may be considered to have so traveled.

Perhaps even more significant than that total failure of proof, however, is the government's tactic in laying its accusation. The government was prepared to prove directly, and by its own agents, that Petitioner had traveled on the date in question from Kansas City to Chicago. The

same inferences upon which it relies to show that the Kansas City trip was for an illegal purpose, if accepted at full value, would equally show that the flight to Chicago was a continuation of that same activity. The government, however, elected to charge Petitioner with a conjectural trip from Chicago to St. Louis, leaving the defense poised to resist evidence which never arrived and unconcerned with the evidence upon which the government planned ultimately to rely.

Again, trial by ambush.

The Consecutive Sentences

Petitioner and his co-defendants were found guilty of conspiracy to violate the so-called "Travel Act", Title 18 U.S.C. Sec. 1952. They also were found guilty (as aiders-abettors, except as noted above) of seven substantive Travel Act offenses of interstate travel or communication. Each of those seven acts of travel or communication also was pleaded in the conspiracy count as an overt act in furtherance of the conspiracy.

Consecutive sentences—and harsh ones—were imposed for each of the counts.

Although the Appellants had argued that all consecutive sentences were improper in the context of this case, the court below considered the issue only as applied to the conspiracy count. The sentences were affirmed in reliance on the general principle that convictions for both conspiracy and a substantive violation which is an overt act of the conspiracy, do not violate the Fifth Amendment's Double Jeopardy Clause. The Court of Appeals defined the issue as "whether each offense requires proof of a fact that the other does not" (A-9), the test prescribed by *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

The opinion below concluded that there is no identity of offense because agreement is an element of the conspiracy offense but not an element of the substantive offenses. (A-10 et seq.)

For purposes of the Double Jeopardy Clause, however, the issue is not whether each *statute* requires proof that the other does not, but whether each of the specific *charges* made in the case under consideration requires proof that the others do not. In *Whalen v. United States*, 445 U.S. 684 (1980), Your Honors found the Double Jeopardy Clause violated by consecutive punishments for rape and felony murder. The two statutes were facially quite different, but the Court found that as applied to that case, proof of rape was a necessary element of proof of the felony murder. In essence, the Court determined that double jeopardy questions must be resolved by considering "the facts alleged in a particular indictment." 445 U.S. at 694.

Pandelli v. United States, 635 F. 2d 533 (6 Cir. 1980) held that *Whalen* "modified the analysis and meaning traditionally given *Blockburger*" and made clear that "the requisite statutory elements must be examined from the vantage point of the particular case before the court." 635 F. 2d at 536.

It seems quite beyond question, in the light of the charges made in this case, that the conspiracy count alleges nothing more than is alleged in each of the substantive counts. It was the government's theory that each defendant was guilty of the substantive charges because he was an aider-abettor of those offenses. He was an aider-abettor, the government claimed, because he had conspired. Each substantive count involved travel or communication which also was charged as an overt act in the conspiracy count.

Thus, Petitioner was convicted under substantive counts 2, 3, 4, 5, 6 and 8 because it was found that an act of travel or communication had taken place in furtherance of a conspiracy of which Petitioner was a member. From his status as a conspirator, he was legally deemed an aider-abettor of that substantive offense.

Those same facts, however, were sufficient to have proved Petitioner's guilt under the conspiracy count. Petitioner's membership in the conspiracy and the performance by any conspirator of any of the alleged overt acts would have been sufficient to prove the conspiracy count, and were elements of the proof of each of the substantive counts.

Beyond serious argument, the conspiracy count did not require proof of any fact which was not an element of proof of each of the substantive counts.[2]

* * *

The cause of justice and of basic decency in the administration of criminal justice, however, will not be served adequately by a mere requirement of concurrency of the

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[2] We are informed that on February 2, 1988, responding to the views expressed in footnote 8 of the opinion of the Court of Appeals (A-13), the trial court modified Petitioner's sentence to provide that the sentence on Count 1 (Conspiracy) should run "concurrently with the sentence announced as to Count 2 and with so much of the sentence announced as to Count 3 as is necessary, and that the sentences as to Counts 2 through 8 shall run consecutively." That ruling was entered on Petitioner's Motion under Rule 35 for reduction of sentence. (The Motion was denied in all other respects.) The modification does not moot the problem presented here, because the undisturbed $10,000.00 fine imposed under Count 1 (A-27) renders the sentence consecutive as to that Count. *Ray v. United States*, ___ U.S. ___, 107 S. Ct. 2093 (1987). Moreover, reversal of Count 2 or Count 3 would mean that the conspiracy sentence would continue to be served consecutively to all affirmed substantive counts.

conspiracy sentence with the *consecutive* substantive counts. Petitioner has been sentenced to consecutive 42-month terms for each of the six Travel Act violations as to which his liability was vicarious; the same sentence for Count 7, involving his questioned travel between Kansas City and Chicago (see pp. 16-18, *supra*); and four years for conspiracy—a total of 28½ years! (App. 1) He was 71 years of age when that sentence was imposed in 1986 (App. 12).

We ask, of course, that the sentences under all counts be reversed for reasons previously assigned.

Apart from that, however, we ask that this Court adopt the approach of the Sixth Circuit as stated in *United States v. Austin*, 529 F. 2d 559, 564, fn. 6 (1976). In *Austin*, consecutive sentences for a bribery conspiracy and related substantive bribery offenses were deemed improper because all offenses had been proved by the same evidence. The *Austin* court vacated the larger of the two sentences "to avoid any incentive for the government to seek similar multiple punishments in the future."

If federal criminal practice, with its prolix multi-count indictments and consequent lengthy and artificially complex litigation, is ever to be brought within rational bounds, it must be by action of this Court. Federal criminal statutes prescribe sentences which are quite adequate to vindicate any reasonable view of the public interest, without necessity to use consecutive sentences as an incentive for multi-count indictments.

We propose the following additional modifications to the doctrines of *Blockburger* and *Whalen*: For a single conspiratorial course of action involving the same victim and not characterized by any crime of violence, only concurrent sentences should be permitted unless otherwise mandated by law.

Concurrent sentences obviate the problems presented to prosecutors and defendants alike where charges are multiplied unnecessarily. See, e.g., *United States v. Cauble*, 706 F. 2d 1322, 1335 (5 Cir. 1983), where imposition of concurrent sentences was treated as a waiver of a defendant's multiplicity claim.

We urge that such a rule would accord entirely with the intent of the framers of the Double Jeopardy Clause and will introduce a healthy sense of reason to the charging process.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Eighth Circuit

No. 86-1439
United States of America,
Appellee,
v.
John Peter Cerone,
Appellant.

No. 86-1440
United States of America,
Appellee,
v.
Milton John Rockman,
Appellant.

No. 86-1441
United States of America,
Appellee,
v.
Joseph John Aiuppa,
Appellant.

No. 86-1442
United States of America,
Appellee,
v.
Angelo LaPietra,
Appellant.

No. 86-1443

United States of America,

Appellee,

v.

Joseph Lombardo,

Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: May 11, 1987
Filed: October 8, 1987

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

BRIGHT, Senior Circuit Judge.

John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo, Angelo LaPietra and Milton John Rockman appeal their convictions for conspiracy to travel in interstate commerce and use interstate facilities with the intent to promote and carry on an illegal activity in violation of the Travel Act, 18 U.S.C. §§ 371, 1952, and on seven substantive Travel Act violations. The appellants raise nineteen allegations of error, some collectively, others individually. For the reasons discussed below, we affirm the convictions.

I. BACKGROUND

The indictment charged that the defendants and several unindicted co-conspirators sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and Fremont, in violation of Nevada gaming laws. These casinos were owned by the Argent

Corporation which, in turn, was owned by Allen R. Glick. Glick's purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators obtained control of Argent Corporation by helping Glick to obtain financing and by placing two of their people, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control of the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund along with Roy Williams, a Teamsters official.

The Government charged that the conspirators were able to control Argent and the Union because they were members of organized crime "groups" in various Midwestern cities. Aiuppa was the boss of the Chicago group, with Cerone as its underboss. LaPietra and Lombardo were members of the Chicago group, and Rockman was an associate of the Cleveland group.[1]

At trial, the Government introduced the testimony of Glick, Angelo Lonardo, a Cleveland underboss, Roy Williams and Carl Thomas, among others. The Government also produced evidence consisting of tape recordings, notes made by DeLuna, and surveillance testimony by FBI agents.

According to the Government's theory of the case, in early 1974, Frank Balistrieri agreed to help Allen Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Nick Civella and Milton Rockman, who each controlled a trustee of the pension fund. Glick then received his loan.

After Glick bought the casinos, Balistrieri and the others required Glick to promote Frank Rosenthal to a management position at Argent. Rosenthal supervised the skim-

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[1] Co-conspirator Nick Civella headed the Kansis City group, and co-conspirator Frank Balistrieri was the head of the Milwaukee group.

ming of gambling proceeds from the casinos. Later, Carl Thomas was placed in charge of the operation for a short time.

Initially, the Kansas City, Milwaukee and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose between the groups, and the Chicago group stepped in to resolve the problem. Thereafter, the Chicago group, including appellants Aiuppa, Cerone, Lombardo and LaPietra shared the skimming proceeds.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. LaPietra became DeLuna's contact with the Chicago group after the death of a previous contact. Appellant Rockman also acted as a contact with DeLuna for the Cleveland group, and as an intermediary with the Chicago group.

Typically, the skimmed money was delivered from Las Vegas to Chicago. LaPietra delivered the skimmed money to Anthony Chiavola, Sr. of Chicago who, in turn, delivered the skimmed money to DeLuna for the Kansas City group and gave the Cleveland group's share to appellant Rockman.

During the period 1976 to 1979, Rosenthal had various widely publicized problems with the Nevada licensing authorities, who considered him to be unsuitable for working as a key employee of a casino. The conspirators were concerned that Rosenthal's problems might jeopardize their interests in Las Vegas casinos and in the skimming operations, and they had numerous conversations about replacing Rosenthal. During the same period, the conspirators also had problems with Allen Glick who was reluctant to accept their control of Argent through Rosenthal. Nick Civella and Carl DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal's direction. Glick yielded to their demands.

In October 1977, independent investment managers took over management of the pension fund's assets, which hindered the conspirators' ability to control the pension fund, to obtain loans and receive other favorable treatment. Thereafter, the conspirators, principally appellant Lombardo and Allen Dorfman, had numerous strategy discussions concerning their efforts to replace the independent managers and other individuals with persons controlled by the conspirators. From 1979 to 1981, the conspirators, including appellants Aiuppa, Cerone, Lombardo and Rockman, took measures to support Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later to support Jackie Presser to succeed Williams in order to maintain the conspirators' influence with the Teamsters Union.

In 1978, DeLuna told Allen Glick that his "partners" were "sick of" dealing with him and that they would kill him unless he sold Argent Corporation. Thereafter, Glick publicly announced his intention to sell Argent and three groups began to negotiate with Glick to buy Argent. In December 1979, Glick sold Argent to Trans-Sterling, Inc.

From March 1978 to May 1980, law enforcement officials conducted many court authorized electronic surveillances of various telephones and locations in Kansas City, Missouri; Leavenworth, Kansas; Las Vegas, Nevada; Chicago, Illinois; and Milwaukee, Wisconsin, including the residences of Carl DeLuna, Anthony Civella, Joe Agosto, and Anthony Chiavola, Sr., and the business offices of Allen Dorfman. Lombardo, Rockman and LaPietra were intercepted during the electronic surveillances.

Law enforcement officials also conducted various court authorized searches and seizures of records and documents. For example, on February 14, 1979, officials seized address and phone books, papers, and other documents from Carl DeLuna's home in Kansas City, Missouri, which contained DeLuna's notes of meetings and telephone conversations among the conspirators, telephone numbers and disbursement of funds in connection with the skimming operation (hereinafter "the DeLuna notes").

On September 30, 1983, a grand jury in Kansas City, Missouri, returned an eight-count indictment against fifteen defendants, charging them with violations of 18 U.S.C. §§ 2, 371, 1952. Carl Civella, Peter Tamburello, Anthony Chiavola, Sr. and Anthony Chiavola, Jr. entered guilty pleas prior to trial. The district court[2] severed the case of Anthony Spilotro from the others, and he died several months after trial. Carl DeLuna and Frank Balistrieri pled guilty during trial. The court dismissed the indictment against Carl Thomas during trial, and he then testified as a government witness. After the close of the government's case, the court entered judgments of acquittal as to John and Joseph Balistrieri.

After a four-month trial, the jury returned guilty verdicts on all counts against the remaining defendants, Aiuppa, Cerone, Lombardo, LaPietra and Rockman. Aiuppa and Cerone were sentenced to consecutive prison terms totalling twenty and one-half years. Lombardo and LaPietra received consecutive sentences totalling sixteen years imprisonment. Rockman also received consecutive sentences, totalling twenty-four years. Each defendant was fined $80,000.

II. DISCUSSION

A. Sufficiency of the Evidence on Count I

All five appellants contend that the evidence was insufficient to convict them on Count I, conspiracy to maintain an undisclosed interest in the gaming interests of Allen Glick. They argue that the evidence failed to show their maintenance of a hidden interest. Rather, at most, the evidence showed a common purpose to skim money by extortion, embezzlement or theft. Some of the defendants contend that the evidence showed that they were merely collecting a "finder's fee" for their assistance to Glick in obtaining his pension fund loan.

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[2] The Honorable Joseph E. Stevens, Jr., United States district Judge for the Eastern and Western Districts of Missouri.

When reviewing the sufficiency of the evidence for a criminal conviction, we must view the evidence in the light most favorable to the jury's verdict. *United States v. Randle*, 815 F.2d 505, 508 (8th Cir. 1987); *United States v. Roenigk*, 810 F.2d 809, 813 (8th Cir. 1987). So viewed, we determine that the evidence was sufficient to convict the appellants on count I as charged in the indictment.

Uncontradicted evidence showed that Frank Rosenthal obtained a managerial position with Argent, that he directed the skimming operation at the casinos and that he acted at the direction and for the benefit of the conspirators. Frank Balistrieri, Nick Civella and Rockman obtained this influence over Argent by arranging for Glick to receive the pension fund loan. All the appellants shared in the skimming proceeds and discussed the working of the operation among themselves. As this court held in *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985), indirect receipt of gambling moneys without the necessary licenses and in violation of state law constitutes a violation of the Travel Act. 763 F.2d at 907. Furthermore, we note that the indictment here is nearly identical to that charged in the *DeLuna* case.[3] We are bound by *DeLuna*'s holding that evidence of the receipt of skimmed moneys from a Nevada casino serves as a sufficient basis to sustain the convictions under the Travel Act indictment. *Id.* at 906-07.

We also reject appellants' argument that a variance in proof existed from what was charged in the indictment. As discussed above, sufficient evidence existed to support the convictions as charged in the indictment. Furthermore, appellants can show no prejudice from any alleged variance. Prior to trial, several co-defendants challenged the indictment, claiming that the charges were the same as those on which they had previously been convicted in the so-called Tropicana case, *United States v. DeLuna*, *supra*. In response, the Government submitted a detailed offer

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[3] *DeLuna* involved skimming from another Las Vegas casino, the Tropicana.

of proof as to what it expected to prove in this case. *United States v. Thomas*, 759 F.2d 659, 664-65 (8th Cir. 1985). With this sort of information, appellants can claim no prejudice or surprise from the evidence presented at trial.

B. *Pinkerton* Instruction

The appellants were indicted as aiders and abettors on seven substantive counts of violating the Travel Act. The court instructed the jury on theories of aiding and abetting, as well as vicarious liability under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946).[4] Appellants argue that the district court erred in submitting both theories to the jury. They contend that the evidence was insufficient to convict them of aiding and abetting. Consequently, the jury must have found them guilty by reason of vicarious liability. This, they claim, is improper because they cannot be convicted as principals under vicarious liability when they were indicted as accessories under an aiding and abetting theory.

Even assuming that the evidence failed to prove aiding and abetting, we do not agree with appellants' argument. Other circuits have held that persons indicted as aiders and abettors may be convicted pursuant to a *Pinkerton* instruction. *United States v. Meister*, 762 F.2d 867, 878 (11th Cir.), *cert. denied*, 106 S. Ct. 579 (1985); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). Although appellants' argument may have some logical appeal, clearly the law fails to support their position.

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[4] Under *Pinkerton*, a party to a continuing conspiracy may be responsible for substantive offenses in furtherance of the conspiracy even though that party does not participate or know of the substantive offenses.

C. Double Jeopardy

Appellants claim that their convictions for conspiracy and for substantive acts taken in furtherance of the conspiracy under a theory of vicarious liability violate the Double Jeopardy Clause of the Constitution.

It is well settled that no double jeopardy violation occurs when a person is convicted of conspiracy and a substantive overt act of the conspiracy. *Albernaz v. United States*, 450 U.S. 333, 344-45 n. 3 (1981); *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975). That the substantive conviction was obtained through a *Pinkerton* instruction is irrelevant. Rather, the focus must be on the offenses and whether each offense requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also Albernaz*, 450 U.S. at 337-39; *Whalen v. United States*, 445 U.S. 684, 691-93 (1980).

The elements of criminal conspiracy (count I) are: (1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants. *United States v. Raymond*, 793 F.2d 928, 931-32 & n. 3 (8th Cir. 1986).[5]

Counts II through VIII allege violations of 18 U.S.C. §§ 2, 1952, the elements of which are: (1) aiding and abetting; (2) the interstate travel or use of interstate facilities; (3) with intent; (4) to promote or manage an unlawful activity; and (5) the actual or attempted promotion or management of the unlawful activity. 18 U.S.C. §§ 2, 1952.[6]

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[5] Count I alleged that appellants conspired to use interstate facilities to carry on the unlawful activity of maintaining an interest in the gambling operations of Allen Glick and indirectly receiving gambling proceeds without being licensed in violation of Nevada gaming laws. Appellants obtained this interest through their control of the Teamsters Union Pension Fund.

[6] Count II alleged that appellants aided and abetted Anthony Chiavola, Sr. on October 7, 1978 to travel and distribute unlawful gambling proceeds.

(Footnote continued on following page)

Upon analyzing the elements of the offenses, it is apparent that conspiracy includes an element that the substantive offense does not; namely, an agreement. Appellants, however, argue that the convictions violate the Double Jeopardy Clause because (1) under the *Pinkerton* theory of liability, conspiracy is an element of the substantive offenses, and (2) aiding and abetting requires or at least implies an agreement. Thus, under either of these arguments, double jeopardy is violated because each offense requires identical elements to be proven.

We cannot accept appellants' first argument. *Pinkerton* itself disposed of their argument. The Court there held that convictions for conspiracy and substantive acts committed in furtherance of the conspiracy do not violate the Double Jeopardy Clause, even though the substantive con-

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[6] *continued*

Count III alleged that appellants aided and abetted Anthony Chiavola, Sr. on December 21, 1978 to make arrangements via telephone for meeting to discuss their interests in the gambling operation.

Count IV alleged that appellants aided and abetted Carl Thomas on November 13, 1978 to discuss by telephone with Nick Civella the operation of the unlawful gambling activity.

Count V alleged that appellants aided and abetted Carl DeLuna on November 16, 1978 to telephone and discuss a proposed change of ownership of Glick's casino with Joseph Agosto and the continuing receipt of unlawful gambling proceeds.

Count VI alleged that appellants aided and abetted Carl DeLuna on November 20, 1978 to telephone Joseph Agosto and discuss the unlawful skimming operation.

Count VII alleged that on January 11, 1978, John Cerone travelled to Kansas City to meet with Carl Civella, Carl DeLuna and Nick Civella to discuss the sale of Glick's casinos and their continuing skimming operation, and that the other appellants aided and abetted this act.

Count VIII alleged that appellants aided and abetted Carl DeLuna on January 16, 1979 to telephone Joseph Agosto and discuss a message to Joseph Aiuppa, the visit of John Cerone, Glick's casinos and the unlawful skimming operation.

viction was obtained solely by means of participation in the conspiracy. *Pinkerton*, 328 U.S. at 646-47. We are bound by *Pinkerton*.

Appellants' second argument in this regard is somewhat more difficult. They contend that the substantive offenses also require proof of an agreement because aiding and abetting implies that at least two people are involved and agree to be involved.[7] Thus, the substantive offenses and the conspiracy count require the same elements to be proven.

However, as the Supreme Court noted in *Iannelli*, agreement remains the essential element of (conspiracy) crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact. 420 U.S. at 777, n.10.

Appellants are essentially advancing the application of Wharton's Rule, which requires merger of the substantive offense and the conspiracy when the substantive crime requires two or more persons for its commission. *Iannelli v. United States*, 420 U.S. 770, 773 & n. 5 (1975). The Rule itself does not rest on double jeopardy principles. *Id.* at 782. The Supreme Court has determined that Wharton's Rule is merely an aid in determining whether Congress intended to create separate offenses. *Id.* at 786. The Court noted that the crimes to which Wharton's Rule classically applied have three general characteristics: (1) general congruence of the agreement and the substantive offense; (2) the parties to the agreement are the only ones who commit the substantive offenses; and (3) the consequences of the substantive crime rest on the parties rather than society while the conspiracy does not pose the threats to society that the law of conspiracy seeks to avoid. *Id.* at 782-83.

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[7] Except for count II, the substantive offenses by themselves require two or more individuals to act together and thus imply an agreement.

Using these factors and examining legislative intent, the *Iannelli* Court analyzed a closely analogous offense to that charged here, 18 U.S.C. § 1955. The Court determined that Wharton's Rule does not apply to section 1955. Furthermore, the legislative intent behind the Organized Crime Control Act of 1970, of which section 1955 is a part, demonstrates a clear legislative judgment to punish conspiracy and the substantive offense as separate crimes. *Id.* at 791.

Applying these considerations to the present case, it is clear that Wharton's Rule does not operate to merge the conspiracy and the substantive offenses. Although the parties to the agreement are the same as those committing the substantive crimes, the conspiracy and substantive offenses are not generally congruent. The conspiracy contemplates a scheme much greater in scope than that encompassed by the substantive offenses. Furthermore, the consequences of the substantive crimes do not rest solely on the parties, rather society at large is affected.

Most importantly, the legislative history underlying the Travel Act indicates that Congress did not intent conspiracy to merge with aiding and abetting a Travel Act offense. The Travel Act was enacted to provide federal assistance in the prosecution of organized crime. H.R. Rep. No. 966, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2665. Congress specifically intended that the Travel Act be prosecuted in conjunction with the aiding and abetting statute so that those who directed others to carry out their illegal missions could be prosecuted. H.R. Rep. No. 966, 87th Cong., 1st Sess. 3, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2666. In addition, conspiracy was proposed as an element of section 1952, but was rejected. 107 Cong. Rec. 13,943 (1961). Accordingly, we believe Congress intended that aiding and abetting a Travel Act offense be a separate offense from conspiracy, and double jeopardy principles are not violated by a prosecution for both offenses.

Thus, under either theory presented by appellants, the Double Jeopardy Clause has not been violated.[8]

D. Jury Instruction

Appellants argue that the district court erroneously instructed the jury on intent. Specifically, they contend that the following instructions are erroneous:

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or act made or done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Jury Instruction No. 74; and

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

Jury Instruction No. 76.

Appellants contend that these instructions impermissibly shifter the burden of proof from the Government to the

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[8] Nevertheless, we are troubled by the multiple sentences for convictions which, in essence, stemmed from the same activities, i.e., proof of Travel Act violations also serve as proof of the conspiracy. The district court may wish to reexamine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences.

defendants and thus violated their due process rights. We do not agree.

First, Instruction No. 74 merely instructs the jury that it may find that a person intends the natural and probable consequences of his knowingly done acts. The creation of this inference does not necessarily violate due process. *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *see also Sandstrom v. Montana*, 442 U.S. 510, 515 (1979). The challenged instruction violates due process only if "the conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.*

Applying this standard to the present case, it is clear that Instruction No. 74 does not relieve the Government of its burden to prove intent. Rather, it allows the jury to make an inference as to intent. Furthermore, the instruction immediately reminds the jury that the inference is merely permissive and that "it is entirely up to [the jury] to decide what facts to find from the evidence." Accordingly, Instruction No. 74 does not violate appellants' due process rights.

Instruction No. 76 presents a more difficult issue. Appellants contend that because the Travel Act offenses are specific intent crimes, the district court erred when it instructed the jury that every person is presumed to know the law.

Although we agree with appellants that the substantive Travel Act offenses are specific intent crimes, it does not follow that the challenged instruction is erroneous. The Government need not show that appellants knew that a law existed to penalize their conduct. *United States v. Golitschek*, 808 F.2d 195, 202 (2d Cir. 1986). Sometimes, however, a specific intent crime requires that the defendant have knowledge of a legal requirement. *Id.*

In this case, appellants present a difficult issue. Knowledge of the licensing requirements under Nevada law would appear to be required for the Travel Act offenses. Instruction No. 76, however, seems to negate the Government's burden of proof in this regard.

Assuming that this instruction is erroneous, we must examine the record to determine whether such an error is harmless. *Rose v. Clark*, 106 S. Ct. 3101, 3107 (1986). Reviewing the record as a whole, we cannot say that the appellants received an unfair trial or that this error affected the composition of the record. The challenged instruction did not create a conclusive presumption, and another instruction advised the jury that the Government had to prove that appellants "knowingly did an act which the law forbids, purposely intending to violate the law." Jury Instruction No. 73. Moreover, the Government adduces ample evidence for the jury to find specific intent. Thus, in light of the record as a whole, any error in the jury instruction that may have introduced a confusing element as to the Government's burden of proving specific intent amounts to harmless error in this case.

E. Disclosure of Informants

Appellants argue that they were deprived of a fair trial because the district court refused to disclose the identity of two confidential informants. Prior to trial, the appellants asked for the identity of the informants and any statements they made, stating that such information "may be relevant and helpful to the defense."

The district court examined various statements and reports *in camera* and also interviewed one of the confidential informants. The court found that one informant did not convey any information to the FBI that was relevant or helpful to the defense. The other informant conveyed information that was used by the FBI to establish probable cause for court-ordered surveillance. The court concluded that disclosure was not required in light of the circumstances of this case, the need for the informants' safety and the information they conveyed.

The district court did not abuse its discretion by refusing to disclose the identity of the confidential informants. In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court stated the governing test for disclosure.

When disclosure of an informant's identity would be material and helpful, the public interest in protecting the flow of information is overcome. *Id.* at 60-62. The defendant has the burden of showing materiality. *United States v. Grisham*, 748 F.2d 460, 463-64 (8th Cir. 1984). Because such a showing may be difficult, the district court may hold an *in camera* proceeding to determine materiality. *Id.* at 464.

In the present case, the appellants only speculated that the confidential informants could provide them with relevant and helpful information. Nonetheless, the district court examined the confidential information *in camera* and concluded that disclosure was not warranted. In reaching its conclusion, the court correctly applied the *Roviaro* test and looked to the circumstances of the case. Accordingly, the district court did not abuse its discretion when it refused to order disclosure of the informants' identity.[9]

We are troubled, however, by the Government's admission on appeal that one of the informants actually testified at trial. This admission apparently came as a surprise to the appellants. The Government, however, has indicated that it informed the appellants at trial that one of the witnesses was a confidential informant.

This incident does not warrant reversal of appellants' convictions. The Government provided all the necessary information to defendants prior to the witness' testimony, and the defendants conducted a thorough cross-examination. Appellants have demonstrated no prejudice from the Government's later use of an undisclosed confidential informant as a witness. Accordingly, the district court's refusal to disclose the informant's identity and the Gov-

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[9] In addition, other relevant factors relating to the safety of the witnesses cautioned against disclosure. In 1982, Frank Rosenthal's car was bombed. In 1983, Allen Dorfman was shot and killed. In 1986, the bodies of co-defendant Anthony Spilotro and his brother were discovered in an Indiana cornfield. In light of the physical danger of the informants and the lack of materiality, the court's decision reflects an appropriate balancing of interests.

ernment's subsequent disclosure that one of the informants testified does not constitute any reversible error.

Admission of Uncharged Crimes

Appellants argue that in numerous instances the district court erroneously admitted evidence of "other bad acts." Among other things, appellants challenge the admission of the statement that Allen Dorfman "was shot dead on the street," and prosecution's presentation of testimony by Angelo Lonardo, Ken Eto, Roy Williams and Aladena Fratianno. In this argument, the defendants also allege error in the introduction of the DeLuna Notes that were also admitted at the prior Tropicana trial.

These contentions lack merit. Appellant Lombardo's counsel elicited the statement about Dorfman and no objection was made. Improper testimony by Lonardo was stricken from the record, and the court properly instructed the jury to disregard Lonardo's improper responses. The testimony of Williams, Eto and Fratianno did not implicate appellants in other crimes. Although the DeLuna notes were admitted in another trial to prove a different conspiracy, the notes admitted in the present case were relevant to prove the conspiracy charged. There is nothing impermissible in using the same evidence to prove two separate crimes. Evidence that is probative of the crime charged and not relevant solely to uncharged crimes is not "other crimes" evidence. *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir. 1985). We determine that the district court committed no error as to the challenged evidence.

G. Admission of Co-Conspirator Statements

All the appellants argue that insufficient evidence independent of co-conspirator statements existed and thus the co-conspirator statements, including the DeLuna notes, should not have been admitted. Without these statements, appellants argue that insufficient evidence exists to support their convictions.

We note that the admissibility of co-conspirator statements is determined by the trial judge and he may consider any relevant evidence in this determination, including the hearsay statements sought to be admitted. *Bourjaily v. United States*, 107 S. Ct. 2775, 2780-82 (1987). Furthermore, the trial court need only determine that a conspiracy existed and that a defendant participated in it. The court is not required to independently inquire into the reliability of the co-conspirator statement. *Id.* at 2782-83.

Accordingly, appellants' argument that the co-conspirator statements should not have been admitted because no independent evidence existed to show a conspiracy, and their participation in it, must be rejected.[10] Thus, the evidence, when viewed in the light most favorable to the Government, is sufficient to support appellants' convictions.

H. Admission of DeLuna Notes

Appellant Aiuppa argues that the DeLuna notes were improperly admitted against him. He claims that the notes were not properly authenticated, were not in furtherance of the conspiracy, insufficient independent evidence connected him to the conspiracy, and the notes' admission violated his sixth amendment confrontation rights.

As noted above, *Bourjaily v. United States*, *supra*, disposes of several of Aiuppa's arguments. It is not necessary that solely independent evidence connect Aiuppa to the conspiracy. Rather, the notes themselves may aid in the connection. 107 S. Ct. at 2782. Nor does their admission violate Aiuppa's confrontation rights. Because the notes were admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), *DeLuna*, 763 F.2d at 909, Aiuppa's confrontation rights were not violated. The re-

[10] In addition, we observe that the Government produced direct evidence of the conspiracy and appellants' participation in it. Allen Glick and Angelo Lonardo testified to their personal knowledge of the appellants' activities.

quirements for admission under the Federal Rules of Evidence are essentially the same as the confrontation clause requirements. *Bourjaily*, 107 S. Ct. at 2782.

In addition, the evidence shows authentication of the DeLuna notes. An analysis of the notes seized in a search of DeLuna's home revealed that DeLuna had written the notes. The notes carried DeLuna's fingerprints. Thus, the notes were properly authenticated as declarations of a co-conspirator. *See DeLuna*, 763 F.2d at 908-09; *United States v. Helmel*, 769 F.2d 1306, 1312 (8th Cir. 1985). The notes were also in furtherance of the conspiracy. They documented numerous meetings among the conspirators and other events, which were corroborated by surveillance and testimony of several witnesses. Accordingly, the district court committed no error in admitting the DeLuna notes.

I. Voice Identification

Appellant LaPietra argues that the Government failed to adequately identify his voice in several tape recorded phone calls and accordingly, those tapes may not be used to connect him with the conspiracy.

The district court did not err when it allowed the identification of LaPietra's voice. FBI Agent Thomeczek testified as to his supervision of the recordings and that he listened to all tapes used as exhibits. He also spoke with LaPietra several times after the indictment was issued and testified that the voice in question was that of LaPietra.

Any person may identify a speaker's voice if he has heard the voice at any time. *United States v. Smith*, 635 F.2d 716, 719 (8th Cir. 1980); *United States v. Vitale*, 549 F.2d 71, 73 (8th Cir.), *cert. denied*, 431 U.S. 907 (1977) (per curiam). Minimal familiarity is sufficient for admissibility purposes. Attacks on the accuracy of the identification go to the weight of the evidence, and the issue is for the jury to decide. *Smith*, 635 F.2d at 719; *Vitale*, 549 F.2d at 73.

Accordingly, the district court did not abuse its discretion when it admitted the identification of LaPietra's voice into evidence.[11]

J. Withdrawal of Overt Act 51 From Jury Consideration

LaPietra also contends that the district court erred when it instructed the jury to disregard overt act 51. At trial, it was admitted that LaPietra's voice was misidentified in the phone call constituting overt act 51. LaPietra argues that the court's instruction prevented the jury from considering exculpatory evidence because the misidentification was helpful to his defense.

We cannot agree with LaPietra's contention. The court did not instruct the jury to disregard evidence of misidentification. Rather, the court instructed the jury to consider LaPietra's defense of voice misidentification and to determine whether the identification was reliable under the circumstances. Jury Instruction No. 92. Accordingly, the court did not deprive LaPietra of his defense.

K. Conspiracy Instruction

Appellant Cerone argues that the district court erroneously instructed the jury that the defendants were guilty of conspiracy if they aided and abetted a substantive count. Alternatively, Lombardo contends that the district court erred by failing to limit the aiding and abetting instructions to the substantive counts.

Upon examining the jury instructions, we determine that appellants' arguments are without merit. The court correctly instructed the jury on the elements of conspiracy. The court then explained the three essential ele-

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[11] LaPietra also argues that the evidence failed to show that he drove a car under surveillance on August 16, 1978. This argument is irrelevant because LaPietra was not charged with driving the car. The only relevant event for that date was a meeting among several co-conspirators, one of whom was LaPietra.

ments of the Travel Act so that the jury could consider the objects of the conspiracy. The aiding and abetting language refers to the substantive Travel Act offenses, not conspiracy. Furthermore, the court clearly instructed the jury that the "gist of the offense" was an agreement. Accordingly, the district court did not commit prejudicial error in its conspiracy instructions.

L. Cerone's Conviction on Count VII

Appellant Cerone argues that the evidence fails to prove that he traveled from Chicago to Kansas City for illegal purposes as alleged in count VII of the indictment. He contends that, at most, the evidence showed he traveled from Kansas City to Chicago. Because the evidence failed to support the offense charged in the indictment, Cerone argues that his conviction must be reversed.

Viewed in the light most favorable to the Government, the evidence showed that Cerone lived in Chicago and was observed leaving Kansas City on January 11, 1979 and arriving at the Chicago airport later that day. Earlier the same day, FBI agents observed Carl DeLuna pick up two unidentified men at the Kansas City airport. They later arrived at Anthony Civella's residence. DeLuna later drove Cerone to the airport in the same car observed earlier. In addition, a DeLuna note recorded that DeLuna met with Cerone and Civella on January 11, 1979 to discuss negotiations to buy Argent. Thus, although no direct evidence established the Chicago to Kansas City flight, the circumstances would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation. Accordingly, a reasonable jury could convict Cerone on count VII, and we sustain his conviction.

M. Identity of LaPietra's Code Name

LaPietra argues that the district court erred when it allowed FBI Agent Ouseley to testify as an expert wit-

ness and identify LaPietra as having the code name "Pitsacuni." He contends that Ouseley was not sufficiently qualified as an expert and that the evidence failed to support Ouseley's conclusion that LaPietra was "Pitsacuni."[12]

A witness may testify as an expert if the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue * * *." Fed. R. Evid. 702; *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 728 (8th Cir. 1985). The trial court's determination of whether a witness qualifies as an expert will not be reversed absent an abuse of discretion. *Federal Crop Ins.*, 765 F.2d at 728; *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1254 (8th Cir. 1985). A witness may be qualified as an expert based on practical experience. *Circle J Dairy, Inc. v. A. O. Smith Harvestore Prods.*, 790 F.2d 694, 700 (8th Cir. 1986); *Federal Crop Ins.*, 765 F.2d at 728.

Agent Ouseley testified that he had been an FBI agent for twenty-five years, had attended training schools, and had previously testified twelve times as an expert on the use of codes. In these circumstances, the district court did not abuse its discretion in allowing Ouseley to testify as an expert.

LaPietra's argument that the evidence did not support Ouseley's conclusion that Pitsacuni was LaPietra's code name speaks to the weight of Ouseley's opinion, not its admissibility. He was thoroughly cross-examined about the evidence upon which he based his opinion. Furthermore, the district court instructed the jury that expert testimony should be considered just like any other testimony and be given whatever weight the jury finds appropriate in light of the expert's qualifications and all the other evidence. Accordingly, we reject LaPietra's claim.

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[12] LaPietra also asserts that the identification is based entirely on co-conspirator hearsay statements and that he is shown to be a member of the conspiracy through these same hearsay statements. As noted above, the trial court may consider hearsay statements in making preliminary determinations concerning admissibility of evidence. *Bourjaily*, 107 S. Ct. at 2780. Accordingly, LaPietra's argument in this regard is without merit.

N. Sufficiency of Travel Act Indictment

Appellant Lombardo alleges that the substantive counts of the Travel Act in the indictment fail to specify the particular acts that the defendants did in furtherance of illegal activity.

We reject Lombardo's contention. Generally, an indictment is sufficient if it sets forth the offense in the statutory language, provided that the statute sets out the necessary elements of the offense. *United States v. McKnight*, 799 F.2d 443, 445 (8th Cir. 1986). Nonetheless, the defendant is entitled to a short, concise statement of facts constituting the offense charged, but he is not entitled to know the evidentiary details with which the government intends to convict him. *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986); *McKnight*, 799 F.2d at 445. In the present case, the indictments contained lengthy statements of fact, and Lombardo clearly cannot claim inadequate notice of the acts with which he was charged. *See supra*, notes 6-7.

O. District Court's Admonition to Lombardo's Attorney

Lombardo argues that he was unfairly prejudiced by the district court's admonition to his attorney, Mr. Oliver, in the presence of the jury. During cross-examination, FBI Agent Palmer testified that he had observed Lombardo driving a red and white vehicle and that he learned the car was registered to Lombardo. Mr. Oliver then asked Palmer "would it surprise you to learn [Lombardo] had never owned a red and white car?" The court then asked Mr. Oliver if he, as an officer of the court, could prove his statement because no evidence of Lombardo's lack of ownership had been entered on the record. The court informed Mr. Oliver that if he could not prove his representation, he would be disbarred and held in contempt. Lombardo contends that this exchange prejudiced him and affected the jury's verdict.

We do not agree. At the next court session, the court gave the jury a curative instruction, stating that the de-

fendant was presumed innocent, was not required to produce evidence, and that the Government carried the burden of proof. The court's instruction served to correct any misunderstanding the jury may have had from the court's prior admonition to Mr. Oliver. Furthermore, the fact in issue, ownership and/or color of Lombardo's car, was not a critical issue. Although the admonition should not have been made in the presence of the jury, these remarks by the court cannot be deemed prejudicial error.

P. Appellant Rockman's Claims[13]

Rockman argues that the district court erred when it ruled on the admissibility of co-conspirator hearsay statements at the close of the Government's case and not at the end of all the evidence. Thus, he contends, statements and acts that occurred after the conspiracy had ended were erroneously admitted.

Rockman's argument alleges that the district court failed to follow the procedures mandated by *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978). He contends that because *Bell* requires the court to rule on the admissibility of co-conspirator hearsay statements at the close of all the evidence, the district court prejudiced his ability to present his defense when it made its ruling at the close of the Government's case. Rockman contends that the court's premature ruling caused it to exclude testimony of Shannon Bybee, a Government witness, who was called by Rockman to testify that Glick had no gaming interests after 1979. Rockman argues that this evidence was crucial because the indictment charged that the illegal objective of the conspiracy was to maintain a hidden interest in the gaming interests of Allen Glick. Because Glick held no

[13] We address Rockman's claims as presented in his substituted supplemental brief. His original brief raised different issues which, although we do not discuss, lack merit. Although this substituted brief raised new issues after the initial briefing, we permitted its filing because of the extraordinary circumstances causing counsel's substitution and in the interest of fairness.

gaming interests after 1979, the district court erred in admitting co-conspirator acts and statements that occurred after 1979.

Initially, we note that it is not per se reversible error for the district court to make *Bell* findings at the close of the Government's case. *United States v. Legato*, 682 F.2d 180, 183 (8th Cir.), *cert. denied*, 459 U.S. 1091 (1982). Rather, we must determine whether Rockman suffered any prejudice from the court's action. *Id.*

Rockman contends that he was prejudiced because he could not establish that the conspiracy ended in 1979 and thus prove subsequent statements inadmissible. Although we are troubled by the district court's exclusion of Mr. Bybee's testimony on Rockman's behalf, we cannot say that the court's action rises to reversible error. In essence, Rockman is alleging prejudice because the evidence varied impermissibly from the indictment. The indictment charged that the conspiracy lasted until 1983. Rockman argues that because the illegal objective was a hidden interest in Glick's gaming interests, the conspiracy ended in 1979 with Glick's sale of his casinos.

As a variance argument, Rockman's challenge is without merit. He had ample and obvious notice that the Government was attempting to prove a conspiracy that endured until 1983. Furthermore, the jury knew of Glick's 1979 sale. The court also instructed the jury that co-conspirator statements made after the end of the conspiracy could be considered only against the person making them. Accordingly, the court did not commit reversible error in this regard.

III. CONCLUSION

For the reasons stated above, we affirm the convictions.

A true copy.

ATTEST:

CLERK U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 86-1439WM

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the
vs.	*	United States District
	*	Court for the Western
John Peter Cerone,	*	District of Missouri.
	*	
Appellant.	*	
	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 23, 1987

Order entered at the Direction of the Court:
/s/ ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States of America
vs.
JOHN PHILLIP CERONE

United States District Court
Western District of
Missouri, Docket
No. 83-00124-08-CR-W-8

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date March 25, 1986.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL Charles Norman Shaffer, Joseph -DiNatale

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of, from in or before January 1974 through September 30, 1983, conspiring with codefendants and with others to violate 18 U.S.C. § 1952 in violation of 18 U.S.C. § 371, as charged in Count One; and of traveling in interstate commerce or using a facility in interstate commerce with the intent to promote, manage, establish and carry on unlawful activities and aiding, abetting, counseling, commanding, inducing and procuring the commission of said offenses, all in violation of 18 U.S.C. §§ 1952 and 2, as charged in Counts Two through Eight of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby remanded to the custody of the Attorney General or his authorized representative for imprisonment for consecutive sentences of four years on Count One and three and one-half years on each of Counts Two through Eight for a total sentence of twenty-eight and one-half years all pursuant to 18 U.S.C. § 4205(a). A fine of $10,000.00 is imposed on each of Counts One through Eight for a total amount of $80,000.00. Defendant shall stand committed until the fines on all eight counts are paid in full or until he is otherwise discharged by law pursuant to the provisions of 18 U.S.C. § 3565. Defendant is ordered to make restitution to the State of Nevada in care of the Nevada State Gaming Control Board in the amount of $30,750.50 in accordance with the provisions of the Victim and Witness Protection Act of 1982 and to pay a share of the costs of this action in the amount of $32,614.73.

* * * * *

The court orders commitment to the custody of the Attorney General and recommends,

United States Medical Center
for Federal Prisoners
Springfield, Missouri
or
Federal Correctional Institution
Lexington, Kentucky

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ JOSEPH E. STEVENS, JR.
U.S. District Judge

Date 3-31-86

Nos. 87-1365, 87-1409, 87-1419, 87-1446 and 87-1543

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court's instruction that everyone is presumed to know what the law forbids and what it requires to be done constituted harmless error.

2. Whether the Double Jeopardy Clause forbids separate convictions and sentences for the offenses of conspiracy to violate the Travel Act, 18 U.S.C. 1952, and a substantive violation of the Travel Act.

3. Whether this Court's decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), should be retroactively applied.

4. Whether the district court improperly precluded petitioner Rockman from offering evidence bearing on the admissibility of certain co-conspirator statements.

5. Whether a defendant who is indicted as an aider and abettor may be convicted as a principal pursuant to *Pinkerton* v. *United States,* 328 U.S. 640 (1946).

6. Whether the district court correctly instructed the jury on the law of conspiracy.

7. Whether the indictment sufficiently alleged violations of the Travel Act.

8. Whether there was sufficient evidence to support petitioner Cerone's conviction on one of the substantive Travel Act counts.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (87-1365 Pet. App. A1-A25) is reported at 830 F.2d 938.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for rehearing and rehearing en banc in No. 87-1543 was denied on December 15, 1987 (87-1543 Pet. App. C1). On February 12, 1988, Justice Blackmun granted an extension of time to and including March 14, 1988, within which to file a petition for a writ of certiorari, and the petition in No. 87-1543 was filed on that date. The petition for rehearing and rehearing en banc in No. 87-1365 was denied on December 16, 1987 (87-1365 Pet. App. B1), and the petition for a writ of certiorari in that case was filed on February 12, 1988. Petitions for rehearing and rehearing en banc in Nos. 87-1409, 87-1419, and 87-1446 were denied on December 23, 1987 (87-1409 Pet. App. B1; 87-1419 Pet. App. B1), and petitions for a writ of certiorari in Nos. 87-1409 and 87-1419 were filed on February 22, 1988 (a Monday). The petition for a writ of certiorari in No. 87-1446 was filed on February 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners were each convicted on one count of conspiring to travel in interstate commerce and to use interstate commerce facilities with intent to promote an unlawful activity, in violation of 18

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 87-1365.

U.S.C. 371; and on seven counts of traveling in interstate commerce or using interstate commerce facilities to promote unlawful activities, in violation of 18 U.S.C. 1952. Petitioners Aiuppa and Cerone were each sentenced to consecutive terms of imprisonment for four years on the conspiracy count and three and one-half years on each of the substantive Travel Act counts, for a total of 28 and one-half years' imprisonment. Petitioners Lombardo and LaPietra were each sentenced to consecutive terms of imprisonment for two years on each count, for a total of 16 years' imprisonment. Petitioner Rockman was sentenced to consecutive terms of imprisonment for three years on each count, for a total of 24 years' imprisonment. The court imposed cumulative fines of $10,000 on each count as to each petitioner. On February 2, 1988, the district court, pursuant to Fed. R. Crim. P. 35, modified the sentences of Lombardo, Rockman, and LaPietra by requiring their sentences on the conspiracy count (Count 1) to run concurrently with their sentences on the first substantive count (Count 2), but leaving unchanged the consecutive sentences on Counts 2 through 8. The court modified Cerone's sentence by requiring his sentence on Count 1 to run concurrently with his sentences on Counts 2 and 3, but leaving unchanged the consecutive sentences on Counts 2 through 8. The court delayed ruling on Aiuppa's Rule 35 motion. 87-1543 Pet. App. B1-B6. The court of appeals affirmed (Pet. App. A1-A25).

1. The evidence at trial is summarized in the opinion of the court of appeals. It shows that petitioners and others sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and the Fremont casinos, in violation of Nevada gaming laws. The casinos were owned by the Argent Corporation which, in turn, was owned by Allen R. Glick. Glick's

purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators achieved control of the casinos by helping Glick obtain the financing to purchase them and by placing two of their confederates, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control over the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund, and Roy Williams, a Teamsters official. Pet. App. A2-A3.

The conspirators exercised control over Argent and the Teamsters Union by virtue of their membership in organized crime groups in various Midwestern cities. Petitioner Aiuppa was the boss of the Chicago organized crime group, petitioner Cerone was its underboss, and petitioners LaPietra and Lombardo were members of that group. Petitioner Rockman was an associate of the Cleveland organized crime group; co-conspirator Nick Civella headed the Kansas City organized crime group; and co-conspirator Frank Balistrieri was the boss of the Milwaukee organized crime group. Pet. App. A3.

In early 1974, Balistrieri agreed to help Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Civella and Rockman, who each controlled a trustee of the pension fund. After Glick obtained the loan and purchased the casinos, Balistrieri and others required Glick to appoint Frank Rosenthal to a management position at Argent. In that capacity, Rosenthal supervised the skimming of gambling proceeds from the casinos. Initially, the Kansas City, Milwaukee, and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose among the groups, and the Chicago group, including Aiuppa, Cerone, Lombardo,

and LaPietra, began sharing in the skimming proceeds. Pet. App. A3-A4.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. During the operation, LaPietra became DeLuna's contact with the Chicago group. Rockman was DeLuna's contact in the Cleveland group and also served as an intermediary in DeLuna's dealings with the Chicago group. Pet. App. A4.

The skimmed money was ordinarily delivered from Las Vegas to Chicago. LaPietra would deliver the money to a member of the Chicago group who, in turn, would deliver shares to DeLuna for the Kansas City group and to Rockman for the Cleveland group. Pet. App. A4.

During 1976-1979, the conspirators had several conversations in which they discussed replacing Rosenthal, who had become embroiled in widely publicized disputes with the Nevada licensing authorities. During the same period, Glick expressed reluctance to accept the conspirators' control of Argent through Rosenthal. Civella and DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal. Glick yielded to their demands. Sometime later, DeLuna told Glick that his "partners" were dissatisfied, and DeLuna threatened to kill Glick unless Glick sold Argent. In December 1979, Glick sold Argent to another company. Pet. App. A4-A5.

In October 1977, independent investment managers took control of the pension fund assets, hindering the conspirators' ability to control the fund. The conspirators, principally Lombardo and Allen Dorfman, held numerous strategy discussions concerning efforts to replace the independent managers with persons controlled by the conspirators. Between 1979 and 1981, the conspirators, in-

cluding Aiuppa, Cerone, Lombardo, and Rockman, supported Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later supported Jackie Presser to succeed Williams, in an effort to secure influence within the Teamsters' Union. Pet. App. A5.

2. The court of appeals affirmed (Pet. App. A1-A25). The court first held (*id.* at A8) that although petitioners were indicted as aiders and abettors in the Travel Act counts, there was no error in submitting those charges to the jury on a theory of vicarious liability under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Next, applying the analysis in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court concluded (Pet. App. A9-A13) that the Double Jeopardy Clause does not forbid separate convictions on the conspiracy and substantive Travel Act counts—even where, as here, liability on the substantive offenses is predicated on *Pinkerton*. The court rejected (Pet. App. A13-A15) on harmless error grounds petitioners' challenge to a portion of the jury charge that stated that "the presumption is that every person knows what the law forbids, and what the law requires to be done" (*id.* at A13). The court next found (*id.* at A17-A18) sufficient evidence to support the admission of the co-conspirator statements in the case. In reaching that conclusion, the court applied this Court's recent decision in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), but also found "direct evidence of the conspiracy and [petitioners'] participation in it" (Pet. App. A18 n.10). The court then upheld (*id.* at A20-A21) the instructions on conspiracy, rejecting as meritless the claim that the trial court had permitted the jury to convict on the conspiracy count if it found evidence that petitioners had aided and abetted a substantive offense. The court next determined (*id.* at A21) that the evidence, although circumstantial,

was sufficient to show that petitioner Cerone had traveled from Chicago, Illinois, to Kansas City, Missouri, for illegal purposes, as alleged in Count 7 of the indictment. The court also concluded (*id.* at A23) that the substantive Travel Act counts in the indictment were sufficient, noting that the indictment contained lengthy allegations of fact and provided ample notice of the acts with which petitioners were charged. Finally, the court held (Pet. App. A24-A25) that petitioner Rockman was not prejudiced by the trial court's exclusion of certain defense testimony regarding Glick's sale of his business interests in 1979—testimony that Rockman had offered purportedly to show that post-1979 co-conspirator statements were not made in the course of the conspiracy, as is required by Fed. R. Evid. 801(d)(2)(E).

ARGUMENT

1. Petitioners first argue (87-1365 Pet. 11-18) that the trial court violated the Fifth and Sixth Amendments when it gave the following instruction (Pet. App. A13):

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

The court of appeals did not approve of that instruction. Rather, it assumed (Pet. App. A15) that the instruction was erroneous. Applying this Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986), however, the court of appeals held that on the present record the error was harmless.

Petitioners acknowledge (87-1365 Pet. 17) that *Rose* v. *Clark*, *supra*, applies, and they do not take issue with the court of appeals' analysis of the record. They simply con-

tend that it is "unclear" (87-1365 Pet. 18) whether the court of appeals found the challenged instruction to be harmless beyond a reasonable doubt. That claim is meritless. Although the court of appeals did not articulate the harmless error standard in so many words, it expressly adopted the analysis employed by this Court in *Rose* v. *Clark, supra.* There is no reason to believe that it did so erroneously.

2. Next, petitioners contend (87-1409 Pet. 8-19; 87-1419 Pet. 18-22) that the Double Jeopardy Clause prohibits separate convictions and sentences for conspiracy and substantive violations of the Travel Act. That contention is mistaken.

This Court has long held that separate convictions and punishments are permissible for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola,* 420 U.S. 671, 693 (1975); *Callanan* v. *United States,* 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States,* 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit the imposition of separate judgments and cumulative punishment. In *Albernaz* v. *United States,* 450 U.S. 333 (1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld

cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez,* 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).[2]

Under that standard, a conspiracy to violate the Travel Act and a substantive violation of the Act are separate offenses and may be separately prosecuted and punished. A conspiracy requires proof of an agreement, while a substantive offense does not; a substantive offense requires proof that the offense was consummated, while a conspiracy does not. The courts of appeals have uniformly

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[2] Citing this Court's decision in *Whalen* v. *United States,* 445 U.S. 684 (1980), petitioners contend (87-1409 Pet. 12-13; 87-1419 Pet. 19-21) that the analysis under *Blockburger* should focus not on the elements of the offense but on the evidence introduced at trial. The *Whalen* case does not alter the traditional test. That case involved a prosecution for the offenses of rape and felony murder. Under the governing statute, felony murder could be committed in the course of any one of six specified felonies, including rape. The defendant was separately punished for both the rape and the felony murder committed in the course of the rape. The government contended that because felony murder could be proved by establishing a predicate other than rape, it followed that under *Blockburger* rape and felony murder could be separately prosecuted and punished. Applying the *Blockburger* test, this Court disagreed. The Court reasoned that the felony murder statute—which listed the six predicate felonies in the alternative—was functionally indistinguishable from a statute that separately proscribed six different species of felony murder under six statutory provisions. The Court therefore regarded each category of felony murder as, in substance, a separate offense, each with its own lesser-included predicate. Under the Court's analysis, therefore, all the elements of rape were included in the offense of felony murder by rape, and under *Blockburger* cumulative punishments would violate the Double Jeopardy Clause. In reaching that conclusion, however, the Court in *Whalen* was careful to point out that it was "not in this case apply[ing] the *Blockburger* rule to the facts alleged in a particular indictment" (445 U.S. at 694 n.8).

reached the same conclusion. See, *e.g.*, *United States* v. *Nickerson*, 606 F.2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Polizzi*, 500 F.2d 856, 897 & n.3 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *United States* v. *McGowan*, 423 F.2d 413, 415-417 (4th Cir. 1970).[3]

The analysis is no different even where, as here, petitioners' convictions on the substantive counts may have rested, under *Pinkerton*, on their participation in the conspiracy. To be sure, under *Pinkerton* each co-conspirator becomes liable for the substantive violations committed by his confederates in furtherance of the conspiracy. In that sense, the conspiratorial agreement is a necessary component of substantive liability under the *Pinkerton* theory. But conspiracy does not, for that reason, become a lesser-included offense of the substantive violation: the latter still requires a completed substantive offense, while the former requires the commission of an overt act that may have nothing to do with the substantive act that gives rise to *Pinkerton* liability. Under *Blockburger*, therefore, con-

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[3] Contrary to petitioners' contention (87-1409 Pet. 13-14; 87-1419 Pet. 19-21), the court of appeals' decision does not conflict with any decision of the Sixth Circuit. Indeed, the Sixth Circuit's decision in *Nickerson* is in accord with the decision reached by the court below. To be sure, the Sixth Circuit, in cases such as *Pandelli* v. *United States*, 635 F.2d 533 (1980), and *United States* v. *Austin*, 529 F.2d 559 (1976), has focused upon the actual evidence submitted at trial instead of the elements of the offenses. In a more recent case, however, the Sixth Circuit recognized that "[t]he *Austin* approach has not fared well in the other circuits" (*United States* v. *McCullah*, 745 F.2d 350, 355 n.6 (1984)) and it emphasized that under *Blockburger* separate prosecutions are permissible "when each offense requires proof of a fact that the other does not" (745 F.2d at 355). Moreover, in *United States* v. *Callanan*, 810 F.2d 544, 545-548 (1987), cert. denied, No. 86-6735 (Oct. 5, 1987), the Sixth Circuit reiterated that the *Blockburger* test focuses only on the statutory elements of the charged offenses. See also *United States* v. *Finazzo*, 704 F.2d 300, 305 (6th Cir.), cert. denied, 463 U.S. 1210 (1983).

spiracy and *Pinkerton* substantive liability are separate offenses and may be separately prosecuted and punished. Indeed, in *Pinkerton* itself, this Court upheld separate convictions and punishments for conspiracy and substantive offenses, even though liability on the substantive offenses was predicated on the doctrine of vicarious liability announced in *Pinkerton*. See also *United States* v. *Wylie*, 625 F.2d 1371, 1380-1382 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).[4]

3. Petitioners claim (87-1409 Pet. 20-24) that this Court's decision in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), should not be retroactively applied. They assert that the court of appeals therefore erred when it relied on *Bourjaily* in finding sufficient evidence to support the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). That contention has no merit.

In the *Bourjaily* case, this Court held that in determining whether a co-conspirator's statement may be admitted pursuant to Rule 801(d)(2)(E), a trial court may consider the statement itself, as well as other "independent" evidence, in assessing whether there was a conspiracy and whether the defendant and the hearsay declarant were members of that conspiracy. The courts of appeals have uniformly followed *Bourjaily* in resolving Rule

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[4] The Fifth Circuit's decision in *United States* v. *Larkin*, 605 F.2d 1360 (1979), modified, 611 F.2d 585, cert. denied, 446 U.S. 939 (1980), is not in conflict. There, the court held that the government could retry a defendant for conspiracy, following a trial in which the jury had been deadlocked on the conspiracy count but had acquitted the defendant on a series of substantive counts in which liability was based on *Pinkerton*. Although the court suggested in dicta (605 F.2d at 1367) that conspiracy may be a lesser-included offense of a substantive offense based on *Pinkerton*, the court did not resolve the issue due to "the procedural posture of th[e] case."

801(d)(2)(E) issues that have arisen since the *Bourjaily* case was decided. See, *e.g.*, *United States* v. *Blackmon*, No. 86-1427 (2d Cir. Feb. 9, 1988), slip op. 6435; *United States* v. *Garner*, 837 F.2d 1404, 1415-1416 (7th Cir. 1987); *United States* v. *Knigge*, 832 F.2d 1100, 1103 (9th Cir. 1987); *United States* v. *Hernandez*, 829 F.2d 988, 993-995 (10th Cir. 1987). Petitioners offer no reason to adopt a different rule.

Moreover, there is no justification for refusing to apply the principles of *Bourjaily* in this case. First, the *Bourjaily* Court did not purport to be creating a new rule, contrary to one on which the defendants had relied. The *Bourjaily* Court simply construed a rule of evidence that has been in effect since 1975. And a rule of evidence of that sort is unlike a substantive rule of criminal liability on which individuals might rely in shaping their conduct. Petitioners do not contend—nor could they—that they engaged in the conduct at issue in this case in reliance on previous circuit law limiting the admissibility of co-conspirator declarations against them.

It would be pointless not to apply *Bourjaily* to this case. If this Court were to hold that the principles of *Bourjaily* should not have been applied on appeal, and if the Court were to reverse on that ground, that would normally entitle petitioners only to a new trial. At the new trial the district court would be obligated to apply the standard announced in *Bourjaily*. There is no reason to set aside a court of appeals' decision where, at any new trial, the legal principle adopted by the court of appeals would necessarily be applied by the trial court as well.

In any event, the present case is an inappropriate vehicle for resolving the issue of the "retroactive" application of *Bourjaily*. The district court (see 87-1409 Pet. 6), affirmed by the court of appeals (87-1365 Pet. App. A18 n.10),

found that there was sufficient independent evidence to justify submitting the co-conspirator statements to the jury. Petitioners' fact-bound challenge to that finding does not warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 & n.5 (1985).

4. Petitioner Rockman contends (87-1543 Pet. 12-18) that the trial court improperly denied him the opportunity to introduce certain evidence that was intended to show that the conspiracy charged in the indictment ended in 1979 and thus that co-conspirator statements made after 1979 should not have been admitted under Fed. R. Evid. 801(d)(2)(E). The court of appeals acknowledged (Pet. App. A25) that it was "troubled" by the exclusion of that evidence, but it held that on the present record the exclusion did not constitute reversible error. That decision is clearly correct.[5]

During the defense case, Rockman attempted to show that the conspiracy charged in the indictment ended on December 26, 1979, when Glick sold his interest in the casinos. At trial, as here (87-1543 Pet. 6-11), Rockman contended that "[t]he object of the conspiracy was inextricably tied to the * * * 'gaming interests of Allen R. Glick' " (*id.* at 7). He asserted that when Glick lost his interest in the casinos, the conspiracy necessarily came to an end. In support of that theory, Rockman called Shannon Bybee as an expert on Nevada gaming laws. Rockman hoped to establish through Bybee's testimony that although Glick held a mortgage on the casinos after he

[5] The court of appeals did not dispute petitioner's right to offer evidence that the conspiracy ended in 1979. Thus, this case does not present the question whether a defendant may offer evidence bearing on the trial court's preliminary determination, pursuant to Fed. R. Evid. 104(a), whether the factual predicates for the admission of a co-conspirator's statement have been established.

sold them, his stake was insufficient under Nevada law to constitute a financial interest in the casinos. The trial court permitted Rockman to ask Bybee various hypothetical questions concerning the circumstances under which Nevada gaming authorities would require that a mortgage holder obtain a gaming license. The court refused, however, to permit Rockman to ask Bybee three hypothetical questions in that line, holding that the proposed questions omitted material facts and were therefore misleading in the form propounded by Rockman. The court advised Rockman that he could ask those questions if he included the omitted material facts. Rockman failed to do so. Gov't C.A. Supp. Br. 11.

The trial court acted well within its discretion in refusing to permit Rockman to put those improper questions to the witness. In any event, as the court of appeals concluded (Pet. App. A25), any error in excluding Bybee's proposed testimony was entirely harmless. A fair reading of the indictment shows that the object of the conspiracy was to secure and maintain a financial interest in Glick's casinos—an object that did not abate when Glick gave up his personal stake in the operation. See C.A. App. 14. Thus, even if Rockman had succeeded in establishing that Glick had ended his financial interest in the casinos in 1979, the trial court was nevertheless correct in concluding that the conspiracy continued for several years thereafter and that co-conspirator statements made after 1979 were admissible under Fed. R. Evid. 801(d)(2)(E).

5. Petitioners contend (87-1419 Pet. 10-16; 87-1446 Pet. 6-15) that because they were named in the substantive Travel Act counts as aiders and abettors (except for Count 7, in which petitioner Cerone was named as a principal), the trial court erred when it submitted those counts to the jury on the theory that petitioners were liable as principals under *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

In essence, petitioners claim that there was a fatal variance between the charges in the indictment and the theory on which the case was submitted to the jury. That claim is meritless.

The courts routinely hold that a defendant may be indicted as a principal but convicted on evidence showing that he aided and abetted the substantive offense.[6] See, *e.g., United States* v. *Gordon,* 812 F.2d 965, 969 (5th Cir. 1987), certs. denied, No. 86-6801 (June 1, 1987) and No. 86-6870 (June 22, 1987); *United States* v. *Cook,* 745 F.2d 1311, 1315 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Kegler,* 724 F.2d 190, 201 & n.15 (D.C. Cir. 1983) (citing cases). The converse is also true: a defendant may be indicted as an aider and abettor but convicted on evidence showing him to be a principal. See, *e.g., United States* v. *Bryan,* 483 F.2d 88, 94-97 (3d Cir. 1973) (en banc); *United States* v. *Bell,* 457 F.2d 1231, 1235 (5th Cir. 1972); *United States* v. *Scandifia,* 390 F.2d 244, 250 n.6 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969). Consistent with that general principle, the courts have regularly held that defendants may be convicted as principals under *Pinkerton,* even though they were indicted as aiders and abettors. See, *e.g., United States* v. *Meester,* 762 F.2d 867, 878 (11th Cir.), cert. denied, 474 U.S. 1024 (1985); *United States* v. *Redwine,* 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *United States* v. *Roselli,* 432 F.2d 879, 894-895 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). In the *Meester* case, for example, the court rejected the same claim pressed by petitioners, noting (762 F.2d at 878) that "[t]his is essentially an argument that the *Pinkerton* instruction constituted a variance from the charges con-

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[6] Indeed, the aiding and abetting statute, 18 U.S.C. 2, specifically provide that aiders and abettors are punishable as principals.

tained in the indictment. To benefit from any such variance, the appellants would have to demonstrate prejudice." Accord *Roselli,* 432 F.2d at 895.

In the present case, petitioners do not suggest how they were prejudiced, if at all, by the fact that the substantive Travel Act counts were submitted to the jury on a *Pinkerton* theory of liability. As in the *Roselli* case (see 432 F.2d at 895), petitioners were indicted on conspiracy charges, and thus had notice of, and an opportunity to contest, the essential element of *Pinkerton* liability. Moreover, the only additional factor under *Pinkerton*—whether the substantive acts were in furtherance of the conspiracy—"was not subject to argument in the context of this case" (*Roselli*, 432 F.2d at 895). In the absence of any showing of prejudice, petitioners' variance contention is insufficient.[7]

6. Petitioner Lombardo claims (87-1446 Pet. 15-16) that the instructions on the law of conspiracy were erroneous, in that the trial court "fail[ed] to limit the aiding and abetting instruction to the substantive counts" (*id.* at 15). The court of appeals examined the instructions and rejected petitioner's claim (Pet. App. A20-A21). It noted that the trial court had "correctly instructed the jury on the elements of conspiracy" (*id.* at A20) and that the aiding and abetting instructions "refer[red] to the substantive

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[7] Petitioners' contention (87-1419 Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Bright,* 630 F.2d 804 (5th Cir. 1980); *United States* v. *Alsobrook,* 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980); and *United States* v. *Miller,* 552 F. Supp. 827 (N.D. Ill. 1982), aff'd mem., 729 F.2d 1464 (7th Cir. 1984) (Table), is without merit. None of those cases involved the question whether a defendant who is indicted as an aider and abettor may nevertheless be convicted on evidence showing that he was a principal under *Pinkerton*.

Travel Act offenses, not conspiracy" (*id.* at A21). Lombardo offers no reason to reject that conclusion.

7. Petitioners contend (87-1419 Pet. 6-10; 87-1446 Pet. 17-20) that the Travel Act counts in the indictment did not state an offense. That fact-bound challenge merits no review.

Count 7 of the indictment (C.A. App. 37-38), which is representative of each of the seven substantive Travel Act counts, alleged, in pertinent part, that on or about January 11, 1979, petitioner Cerone traveled in interstate commerce from Chicago, Illinois, to Kansas City, Missouri, for the purpose of meeting with Carl Civella, Nick Civella, and Carl DeLuna

> to discuss matters pertinent to the sale of or transfer of ownership of the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving the management, operation, conducting and carrying on of gambling operations of licensed gaming establishments in Las Vegas, Nevada, that is, the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, and the indirect receipt of moneys played therein, by persons who were not licensed by, and whose interest in said gaming establishments had been concealed from the Nevada Gaming Control Act * * * and regulations of the Nevada Gaming Commission * * * and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of

> said unlawful activity and [petitioners and others] did aid, abet, counsel, command, induce and procure the commission of said offense.

Under Fed. R. Crim. P. 7(c)(1) an indictment need only be "a plain, concise and definite written statement of the essential facts constituting the offense charged." The rule was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *United States* v. *Debrow,* 346 U.S. 374, 376 (1953). An indictment is ordinarily sufficient if it contains the elements of the offense, fairly informs the defendant of the charge, and enables him to avoid a future prosecution for the same offense on double jeopardy grounds. *United States* v. *Bailey,* 444 U.S. 394, 414 (1980); *Hamling* v. *United States,* 418 U.S. 87, 117-118 (1974). To meet that standard, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished' " (*Hamling,* 418 U.S. at 117, quoting *United States* v. *Carll,* 105 U.S. 611, 612 (1882)).[8]

An indictment under the Travel Act requires an allegation of " '(1) [travel in] interstate commerce or use of an interstate facility, (2) with intent to promote an unlawful activity, and (3) a subsequent overt act in furtherance of that unlawful activity.' " *United States* v. *Brown,* 770 F.2d

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[8] As this Court has put it, " 'the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.' " *Armour Packing Co.* v. *United States,* 209 U.S. 56, 84 (1908) (citation omitted).

768, 772 (9th Cir.) (citation omitted), cert. denied, 474 U.S. 1036 (1985). In this case, each substantive Travel Act count tracked the statutory language and stated each of the prescribed elements. "Because the Travel Act fully and unambiguously sets out the essential elements of the offense, indictments drafted substantially in its language are sufficient." *United States* v. *Stanley,* 765 F.2d 1224, 1239-1240 (5th Cir. 1985). Accord *Turf Center, Inc.* v. *United States,* 325 F.2d 793, 796, 797 (9th Cir. 1963).

8. Petitioner Cerone contends (87-1419 Pet. 16-18) that the evidence was insufficient to support his Travel Act conviction on Count 7. Count 7 alleged that on or about January 11, 1979, Cerone traveled from Chicago, Illinois, to Kansas City, Missouri, to meet with DeLuna, Carl Civella, and Nick Civella, to discuss the sale of the Stardust and Fremont casinos (C.A. App. 37-38). The court of appeals conducted a meticulous review of the record and concluded that the evidence on that count was sufficient (Pet. App. A21). As the court explained, the evidence showed that Cerone lived in Chicago. On January 11, 1979, FBI agents observed Carl DeLuna pick up two men at the Kansas City airport and take them to Anthony Civella's residence. DeLuna later drove Cerone back to the airport in the same car that was observed earlier. Cerone was then seen leaving Kansas City and arriving at the Chicago airport. In addition, notes taken by DeLuna and admitted at trial recorded that DeLuna met with Cerone and Civella on January 11, 1979, to discuss negotiations to buy Argent. That evidence, the court of appeals concluded (*ibid.*), "would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation."

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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No. 87-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN PETER CERONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

May it please the Court:

In presenting its consolidated response to the several petitions seeking review of the proceeding below, the government ignores the issue which may be the most significant of all.

Our Petition (pp. 11-16) argued that the terms conspirator, aider-abettor and principal should not be treated as synonyms. The government responds (Br. 15-16), in essence, that prosecutors are entitled to make a whimsical

election to designate an indictee as either an aider-abettor or a principal, because courts "routinely" permit persons indicted as abettors to be convicted on evidence showing them to be principals, and vice versa.

The thaumaturgical equivalent of that position is levitation. That the government has been permitted by some courts to treat two different concepts as interchangeable does not convert whimsicality into reasonableness.

When the third designation—"conspirator"—is added to the prosecutor's list of convertible accusations, the result is an opaque potpourri none of whose ingredients is indentifiable. It is on that basis that the government was enabled to convict Petitioner of conspiracy to conspire to aid and abet the conspiracy.

A conspiracy to conspire to aid and abet the conspiracy is a concept which defies both fundamental logic and the Sixth Amendment. In the context of this case, the government's argument (Br. 15-16) that no harm results unless the indictee can show prejudice amounts to a claim that evidence can be sufficiently voluminous to demonstrate that the indictee is guilty regardless of the nature of the accusation.

* * *

Turning to a related issue, we invite the Court's special scrutiny of the government's attempted distinction between a conspiracy and a substantive offense prosecuted under a *Pinkerton* theory. They are two very different offenses, the government contends, because:

> The **Pinkerton offense** is proved by showing an agreement followed by a criminal act.
>
> —While on the other hand—
>
> A **conspiracy** is proved by showing an agreement followed by *any* furthering act. (G. Br. 10).

Otherwise stated, it is the government's position that if a conspiratorial agreement produces a crime, the prosecutor has two choices with respect to vicarious liability: Treat the crime as the overt act, thus charging a single offense; or multiply the charges by treating some otherwise noncriminal furthering act as the second element of the conspiracy while simultaneously prosecuting the substantive crime on a vicarious *Pinkerton* theory.

If that is the law, it is high time that doctrine were removed from American jurisprudence as an unwelcome circumvention of the Fifth Amendment's double jeopardy clause.

Respectfully submitted,

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